December 7, 1999

In the Matter of:	
David R. Lemoi Claimant	
v.	
	Case No. 1999-LHC-1342
Electric Boat Corporation Employer/Self-Insurer	
	OWCP No. 1-137446
and	
Director, Office of Workers' Compensation Programs, United States Department of Labor Party-in-Interest	

Appearances:

Stephen C. Embry, Esq.
For the Claimant

Lance G. Proctor, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on August 26, 1999 in New London, Connecticut at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
RX 24A	Attorney Proctor's letter filing the	10/04/99
RX 25	September 8, 1999 Deposition Testimony of Dr. Thomas Godar, and requesting an extension of time to file additional evidence	10/04/99
ALJ EX 9	This Court's **ORDER** granting the request	10/04/99
RX 25A	Attorney Proctor's letter filing the	11/12/99
RX 26	November 2, 1999 Deposition Testimony of Paul F. Murgo	11/12/99

The record was closed on November 12, 1999 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. Prior to June 4, 1996, Claimant suffered an injury in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on March 10, 1999.

7. The applicable average weekly wage is $625.70.

8. The Employer voluntarily and without an award has paid temporary total and temporary partial compensation for various periods of time for a total of $46,811.23 as of August 14, 1999. Medicals thus far total $9,083.51.

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. The date of his maximum medical improvement.

3. The applicability of Section 8(f) of the Act.

Summary of the Evidence

David R. Lemoi ("Claimant" herein), forty-five (45) years of age, with an eighth grade formal education and an employment history of manual labor, began working on November 3, 1976 (RX 5) as a painter/cleaner at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. Claimant's duties involved, **inter alia**, cleaning and preparing the surfaces for painting and then actually painting same as directed all over the boats. He used various paints, chemicals and solvents to perform his maritime duties. He worked as a painter/cleaner on the boats until sometime in the 1980s, at which time he was pulled off the boats because of bilateral hand problems and the work restrictions imposed by his doctor. He was paid workers' compensation benefits for the absences from work because of those problems. He was assigned light duty work in the tool room where he had duties of receiving, storing and handing out tools, material and supplies to workers in the paint department. He did that work for about one year and he was then reassigned to the paint shop where he had duties of mixing and handing out to workers paints, as well as painting some smaller items before they were installed on the boats by other workers. He did that work for about one month and he was then reassigned to the South Yard where he ran the "Wheelabrator," a rather large machine that "takes rust off material to be painted." He did that work for almost seven (7) years or until such time as "(t)hey closed the job down." Claimant also injured his back in a shipyard accident in 1989 and he has had back problems ever since that time. Dr. S. Pearce Browning, III, treats Claimant's lumbar problems, for which the doctor has imposed work restrictions. (TR 20-28; ALJ EX 6 at 3-11; RX 5)

Claimant, who has had several surgeries to his hands also suffers from respiratory problems and Dr. Arthur DeGraff, a pulmonary specialist, treats those problems. Dr. Bruce Bailey is Claimant's family physician. Claimant has a sixty pack year smoking history (30 years x 2 PPD) and when he began to treat with Dr. DeGraff, he has decreased his habit to one pack per day. He cannot return to work at the shipyard because of the physically demanding duties of his former jobs there and he is working with the Employer's vocational rehabilitation consultant to retrain himself for another field of endeavor. He worked at the Mohegan

Sun Casino as a security guard in late 1996 but that job required prolonged standing for the forty (40) hour work week and Dr. Browning has imposed restrictions against prolonged standing because it "aggravates" his back. He was able to do that work only for one week and he is not sure as to whether or not he can do other work because of his multiple medical problems. Claimant experiences daily bilateral hand, lumbar and respiratory problems, and cold weather especially aggravates those symptoms. (TR 29-31; ALJ EX 6 at 12-20)

Claimant's medical records reflect that he was examined by Elizabeth S. Lamb, M.D., on March 24, 1983, on referral from Dr. Browning and Dr. Lamb states as follows in her report (RX 19):

INTERVAL HISTORY: This 27 year old right-handed painter/cleaner at Electric Boat was originally seen on June 23, 1982. At that time, he gave the history of having experienced severe pain in the left antecubital fossa while lifting a heavy locker at work on April 13. On June 21, he had to leave work due to the onset of numbness of the fingers of the left hand, which had occurred a few days previously. He was found to have very slight slowing in the distal sensory fibers of the left Median nerve, consistent with an early Carpal tunnel syndrome on that side.

Apparently, patient has been in and out of work a few times since last seen here, and has been on light duty since February 3, 1983.

He is complaining that climbing up and down ladders, picking up buckets in "tight spaces", using a burr machine, etc. cause the "whole" left hand to go numb, and the left lateral forearm to ache. The left antecubital fossa becomes painful when he uses the left hand "a lot", and, occasionally, even when resting. At times, he is awakened from sleep by pain in the antecubital fossa, but not by paresthesiae.

He is not taking any medication...

IMPRESSION: Carpal tunnel syndrome, left; R/O Pronator syndrome...

COMMENT: There is evidence of a <u>more advanced Carpal tunnel syndrome on the left</u>. Not only is there more slowing in the distal sensory fibers of the (L) Median nerve, but there is more than 1.5 msec. difference between the distal motor latency of the (L) Median and ipsilateral Ulnar nerve.

There is no EMG evidence of a Pronator syndrome, according to the doctor.

Dr. Browning sent the following letter on March 27, 1985 to the Employer's workers' compensation adjusting firm (RX 17-11):

As you are aware I saw the above individual in the office on March 18, 1985 and March 25, 1985 as per the attached notes.

He was apparently at work on March 14, 1985 lifting and moving steel. He got an acute pain on the volar side of the right wrist where I had previously done a carpal tunnel release. I saw him on March 18, 1985 and put him in a brace and on anti-inflammatory medications and he did not improve much by the time I saw him on March 25, 1985 and I changed his medication.

I may have a lot of problems with this.

You should make note of the fact that this is a second injury imposed upon the right wrist and I am not sure whether this will make you eligible for the Second Injury Fund on the right, but you can at least look into it, according to the doctor.

The Employer has also referred Claimant for a second opinion by its own orthopedic surgeon and Dr. H. Kirk Watson sent the following letter to the Employer on April 18, 1985 (RX 20):

This is a 29-year-old right handed, male, who developed work related carpal tunnel syndrome, apparently, and had surgery on the left side in June of 1983 and surgery then on the right side for carpal tunnel syndrome in June of 1984. The patient was on light, restricted work during this past 10 months, but on March 12, he was placed back on regular work and heavier work in the paint shop. On March 14, the patient was asked to move some steel and began this apparently about 7:30 in the morning, when he started his job and at 11:00 that morning, while lifting a piece of steel, he noticed pain in the wrist without a significant injury to the wrist, and has been out of work basically since that time. The patient states he was pleased with his light duty work and says he does not intend to work on the boats and the heavy work. When asked about specific complaints at the present time, he lists first coldness in the fingers and a cold sensation in the hand, soreness in the right wrist and soreness in the right elbow and upper forearm. There are no carpal tunnel complaints and that apparently has been cleared since the surgery.

The past history and review of systems are non-contributory...

X-rays demonstrate no major objective abnormality as stated, except for an old tear of the proximal attachment of the radial collateral ligament of the right middle finger, apparently not requiring treatment at this time, according to the doctor.

Dr. Browning sent the following letter on April 19, 1985 to Donald C. Kent, M.D., the Employer’s Medical Director (RX 17-12):

Enclosed please find a work restriction form on the above gentleman. You will note that the work restrictions are referrable

to the hands alone. He can climb stairs but not ladders because you do not need your hands to climb stairs.

As far as crawling is concerned, this is really limited a bit by how well the hands are doing, but he can certainly do some of it.

After careful consideration of the lifting limits, I had set a lifting limit of 10-20 pounds. Apparently the injury of 3/14/85 occurred when he was lifting something in the range of 50-70 pounds.

My small slip has set a lifting limit of 25 pounds but the work restriction form doesn't quite fit that, so 20-25 pounds maximum should be it.

I will be seeing him on April 23rd, 1985 and he will have seen Dr. Kirk Watson on April 18th. When I see him on the 23rd, I will see about a return to work.

You will understand that the above weight lifting limit specifically excludes lifting five gallon cans of paint which I gather weigh in the 50-75 pound area.

As far as the hand restrictions are concerned, he is able to grasp but not heavy grasping or repetitive grasping. Push-pull operations you'll have to judge for yourself. Fine manipulation I think he can do.

If there is any question as to my opinion as to a specific work limitation, please contact me.

I have explained to him that I cannot communicate directly with his supervisors, but all such correspondence must go through you and that this is not unique to him but applies to all employees of Electric Boat, according to the doctor.

Dr. Browning then sent the following letter on July 28, 1986 to the Employer (RX 17-18):

I have your letter of July 24th, 1986 at hand and I've reviewed this.

I think it would be reasonable to pay him in the way which you have outlined, being five (5%) percent to May 26th, 1982 and five (5%) percent of March 14th, 1985.

I think this would be reasonable and fair to all parties concerned, according to the doctor.

Dr. Browning updated Claimant's work restrictions on February 11, 1993, at which time Claimant was "doing reasonably well," although still experiencing "ache and discomfort in both hands."

Dr. Browning “asked him to take it easy (and) not push the hands too far.” (RX 17-26-29)

On February 17, 1993 Dr. Browning sent the following letter to the Employer (RX 17-30):

I saw the above patient in the office on 1/28/93 for the back and on 2/11/93 for the back and the hands and I made a new work restriction form and a copy is attached. So far he his able to function although he has to be careful, particularly how he stresses the hands, according to the doctor.

Dr. Joseph P. Zeppieri, an orthopedic surgeon, examined Claimant at the Lawrence and Memorial Hospital (L&M) on July 31, 1995 and the doctor reports as follows (RX 18-1):

Mr. Lemoi is a 39-year-old, right-handed electrical company painter who has had pain in his right elbow for more than a year. This is centered over the lateral epicondyle. He has been treated with non-steroidals and steroid injection without significant improvement. He has been out fo work now for about three months because of these symptoms. He had been scheduled for lateral epicondyle release over a month ago. He left the hospital without surgery because of a bad feeling...

PAST SURGICAL HISTORY: Includes bilateral carpal tunnel releases...

DIAGNOSIS: Lateral epicondylitis, right. He has a history consistent with chronic obstructive lung disease.

He is scheduled for lateral epicondyle release, according to that report.

The Employer has also referred Claimant for an examination by Dr. Myron E. Shafer, an orthopedic surgeon, and the doctor sent the following letter to the Employer on January 23, 1996 (RX 21):

CHIEF COMPLAINT: Pain in low back and elbows.

SUMMARY: This patient is a 40-year-old man seen for orthopedic evaluation. He is an employee of Electric Boat who states that he has had several injuries. He states he injured his back lifting plates at work in 1989. He has been under the care of Dr. Pearce Browning since that time.

In 1991 he states he began to develop pain in his elbows and he recently had an operation by Dr. Zeppieri. The operation was for lateral epicondylitis of the right elbow and this was done about two months ago. He states surgery is being considered on the left elbow although he has only minimal symptoms in his left. He states he does painting. He has been out of work since July because of the restrictions on his back and arms. He states he has also had in the past bilateral carpal tunnel releases by Dr. Browning. He states the pain in his back does go into his right buttock and

somewhat his right leg. He has pain with walking, sitting, standing, driving, bending or lifting . He states he smokes a pack of cigarettes a day and has done so for twenty years...

X-RAYS: The patient brought in x-rays of the lumbosacral spine dated February 1992 and October 1993. These x-rays were essentially negative.

DISCUSSION AND COMMENT: This 40-year-old man was seen for orthopedic evaluation on 1-23-96. He states he has had an injury to his back and has had difficulty with his back since 1989 and difficulty with his arms since 1991. He has been under the care of Dr. Browning as far as his back is concerned and he has had surgery on his right elbow by Dr. Zeppieri. After examining him I do not feel he needs any surgery on his left elbow. I do not feel he is having enough symptoms there. In regard to his back, he does have pain in his back with some radiation down his right elbow. From an objective point of view I could find no real objective findings. He has mainly subjective complaints that prevent him from returning to work at Electric Boat. Now he is recovering from elbow surgery and cannot do his work as a painter because of the elbow but he should eventually be able to return to work. However, the problem is to explain his subjective complaints. He states the work he does is difficult in that he has to go inside the boats.

It is my opinion he has reached the point of maximum improvement as far as his low back is concerned and has a 5% permanent partial disability of his low back. In my opinion after elbow surgery disability of the right elbow should be 5%. There is no pre-existing condition noted and he has not done any work since he stopped working in July, according to the doctor.

Claimant has also been examined by Dr. Arthur C. DeGraff, Jr., a pulmonary specialist, and the doctor sent the following letter to Claimant’s attorney on June 28, 1996 (CX 9):

Thank you for referring David Lemoi to me for evaluation of industrial asthma. Mr. Lemoi notes shortness of breath on moderate exertion. His work history is as follows. Born 11/4/55, his first job was in 1971 at the age of 16 pumping gas for a gas station. That job lasted for a year. In 1972 he went to work for a braiding company which manufactured elastic for clothing. In that job he worked in the shipping/receiving department and the job was associated with some dust exposure from the cotton and rubber fabric. He worked there until 1975 and then went to work for Amtro where he assembled diaphragms for air tanks for one year. There was no dust exposure while working at Amtro. In 1976 he went to work for Electric Boat as a painter in which job he continued until 7/95 when he was laid off and placed on workers compensation for carpal tunnel syndrome in his hands. For the first 10 years he worked for Electric Boat he worked on the ships and was exposed to the usual paint fumes, dust, etc. His work for Electric Boat began

after asbestos abatement procedures had been put in place. In approximately 1986 he developed carpal tunnel syndrome and for that reason he was no longer able to perform the usual jobs required of a painter and was therefore taken off boats to work in a shop where his primary responsibility was to tend a wheelabrator device. Various metal parts that required cleaning including the removal of rust or paint were placed in the wheelabrator for various lengths of time during which time the parts were bombarded with particles to remove the contaminants. The wheelabrator device was vented to a dust barrier and to various filters and finally vented to the outside. The only time that Mr. Lemoi was exposed to dust while working with the wheelabrator was when the device was unloaded or loaded at which time a certain amount of dust would escape. In addition to running the wheelabrator device, Mr. Lemoi was also responsible for hand painting various parts in which job he frequently used Mare Island paint which he describes as two-component paint, the hardener component of which is felt to be isocyanate. On further questioning, Mr. Lemoi notes that he experienced chest discomfort, tightness and shortness of breath when working with Mare Island paint if he was not wearing a respirator. Most of the time he wore a respirator when using Mare Island paint. However, there were other people in the shop who used Mare Island paint, and since painting was done in an open area, Mr. Lemoi and other workers were exposed to Mare Island paint. He notes that when others were painting with Mare Island paint, he would experience chest tightness, cough and would sometimes need to leave the building because of progressing respiratory symptoms. He describes use of “Black Polly paint” which was two parts paint and one part hardener, exposure to which also caused chest tightness. He recalls that 3-6 years ago he mixed paint in the shop and experienced chest tightness if he did not use a respirator. On further questioning, he indicates that when he was working on the boats 10 years ago he would paint with two-part epoxy paint which he believes was called Sovapar paint. He did not note significant respiratory symptoms when using that paint. He finally noted that major respiratory symptoms occurred when exposed to Mare Island paint.

PAST MEDICAL HISTORY: Significant for carpal tunnel syndrome as noted above and he has had “tennis elbow.”

Diffusing capacity was measured in the pulmonary laboratory at Hartford Hospital. It is within normal limits.

SPIROMETRY: Performed in my office and revealed moderately severe airway obstruction with significant improvement in one second expiratory volume following administration of bronchodilator, indicating reversible component to airway obstruction consistent with reactive airway disease.

IMPRESSION: Asthmatic Bronchitis. Industrial asthma secondary to isocyanate fume exposure.

RECOMMENDATIONS: Stop smoking. Begin use of Serevent 2 puffs BID.

Based on AMA **Guides to Evaluation of Permanent Impairment**, 4th Edition, Mr. Lemoi has class 2, 25% mild impairment of the whole person based upon reduced FEV_1. Since Mr. Lemoi's respiratory treatment has not been optimized and he continues to smoke, the extent of permanent disability cannot at this time be determined.

I have strongly suggested to Mr. Lemoi that he stop smoking and have discussed with him the possibility of development of chronic obstructive lung disease if he persists in smoking. He promised to attempt smoking cessation and if he is successful reevaluation of disability may be appropriate in 3-6 months, according to the doctor.

Dr. Zeppieri sent the following letter to the Employer on March 14, 1996 (RX 18-10):

I am responding to your letter of February 12, 1996, regarding Mr. Lemoi.

I felt that David Lemoi was able to do most work as far as his right arm was concerned. I returned him to the care of Dr. Browning, who was originally treating him for this. Dr. Browning has certified him for all work with the right upper extremity with the exception of air-driven and vibrating hand-held tools.

I concur with that recommendation, according to the doctor.

Claimant's July 16, 1996 progress report reflects the following (RX 17-49):

7/16/96 Patient seen today. He's still out on COMP because of the back.

The arm, right side, is doing fine; left side he has a positive Phalen's test at the wrist and a mild Tinel's. He is right-handed. Allen's test left side radial moderate ulnar mild. He needs an up-to-date work restriction form so I have given him one copy for the Yard Hospital and one copy for Alice Conger and one copy for himself. I will send a copy of the work restriction form also to Embry and Neusner.

I will rate these at 7 1/2% permanent partial impairment of each hand.

Re-check October 15, 1996, according to the report.

Dr. Browning sent the following letter on July 30, 1996 to Claimant's attorney (RX 17-50):

I have your letter of June 25, 1996 at hand.

I saw Mr. Lemoi in the office on July 16, 1996. He still has a mild Phalen's and Tinel's test on the left hand. At this point, I would recommend a rating of 7 1/2% of the right master hand, and 10% of the left non-master hand. I would reserve the right to review the situation in two years.

As I understand it, he is out of work at this time because of his back.

I plan to see him in three months on October 15, 1996, according to the doctor.

The Employer has also referred Claimant for a pulmonary evaluation at Saint Francis Hospital and Medical Center, Hartford, and Dr. Thomas E. Godar reports as follows in his November 11, 1996 nine page letter with attachments (RX 15):

CHIEF COMPLAINT: The patient is a 41 year old white male who was formerly a painter at the Electric Boat Shipyard and Operating a wheelabrator prior to July 1995 when he left the Electric Boat Shipyard with respiratory complaints, thereafter filing for workers' compensation and unemployed since that time, referred for the purpose of an independent medical examination and still carried on the Electric Boat Shipyard roles, though no longer actively employed since his job has now been classified as no longer available and closed.

OCCUPATIONAL HISTORY: 1971 - He left school without receiving a high school diploma.

1971 - 1972 - He worked pumping gasoline in a Coventry, Rhode Island gasoline station.

1972 - 1975 - He worked for Warwick Braid, an elastic band manufacturing firm where he was employed in shipping and receiving but not in the processing of materials.

1975 - 1976 - He worked for Amtro, an air tank manufacturing firm, being involved in assembly of water tanks and similar tanks with no welding or soldering involved.

1976 - 1996 - He began work as a painter at the Electric Boat Shipyard doing both brush and spray painting but doing no sandblasting, although cleaning was an inherent part of his job. He worked on the subs for five years and otherwise worked in the paint shop, being moved to the South Yard in the 1980's.

In his construction activity approximately one half of his time was spent in new construction and half in renovation work where there was, in fact, some limited exposure to asbestos. In the 1980's a respirator was used with an outside air source and specific cartridges based on the nature of the paints and chemicals to which

he was exposed. He did a great deal of wheelabrator shot abrasive sanding for the last 7-8 years of his employment and this involved approximately 75% of his work time in the last years. He indicates that in the processing of steel, many were painted and then had to be blasted and repainted, the patient continuing this type of activity until he terminated in July of 1995 when his job was closed and there was no longer boat work available for him given the restrictions that had been placed on him by his treating physician, specifically the orthopedic surgeon who had been treating back and arm injuries, primarily Doctor Browning. The patient had mild shortness of breath with some paint exposures especially with Mare Island Paint, which was being applied by other workers near his work station. He had exposure to epoxy resin paints which in the latter years caused cough, dyspnea and wheeze. These symptoms were discreetly episodic and only occurred in the last one or two years of his employment, in fact, only occurring at selected times in spite of recurring exposures to similar paints. He, therefore, had an inconsistent response to pain exposure...

LABORATORY STUDIES: Chest x-ray - A chest film on 11/11/96 reveals only minimal hyperinflation with a normal cardiac configuration and clear lung fields. There is a mild obscuring of the middle portion of the right pleural margin but no definite pleural thickening or plaques.

Pulmonary function test - Pulmonary function studies on 11/11/96, a copy enclosed, reveals airway obstruction that is moderate in degree and which is only partially responsive to a bronchodilator, suggesting a reversible and a more significant fixed component. This is associated with a moderate distention, abnormal gas mixing, and a mild impairment in single breath diffusion capacity utilizing the highest available predictors for single breath diffusion. The maximum voluntary ventilation is mildly impaired after bronchodilator.

The findings are consistent with a predominant COPD in which there is a small reversible component that is quite limited. The low-normal total lung capacity and mild reduction in ERV is consistent with a marginal restriction associated with patient’s level of obesity.

IMPRESSIONS: Mild to moderate COPD with the greatest flow abnormality in small airways and only a mild diffusion defect secondary to extensive cigarette smoking.

Mild asthmatic bronchitis (hyperreactive airway disease) superimposed on COPD, possibly associated with isocyanate paint exposure in the workplace but the history inconclusive.

Marginal restriction of lung function secondary to

mild obesity (note measured height and weight in PFT of 11/11/96)

Status post lumbar back strain, stable.

Status post bilateral carpal tunnel syndrome and surgical correction.

Status post full dental extractions, with dentures.

COMMENTS AND RECOMMENDATIONS: Mr. Lemoi has a substantial cigarette smoking history, having begun smoking at an early age and smoking for some time up to two packs per day but considering that he averaged one pack per day most of his smoking years and only recently reducing his consumption on the strong advice of Doctor DeGraff, and probably his primary care physician as well. He has the characteristic findings of COPD with relatively fixed airway obstruction associated with distention, a substantial delay in gas mixing but fortunately, only a mild reduction in diffusion capacity, suggesting a mix of chronic bronchitis and emphysema in which emphysema is not necessarily the predominant defect. He is, therefore, fortunate that his obstruction is at most moderate and his diffusion defect is only mild. This is consistent with his ability to continue employment in spite of symptoms with a fair exercise tolerance, although frankly, the patient has been so inactive in the last year he is thoroughly deconditioned.

Using reasonable medical judgment and the AMA Guide to the Evaluation of Respiratory Impairment, 4th edition, 1993, I would consider the patient had no more that a 20% impairment of function for both lungs and the whole person with the greatest abnormality noted in small airway flow and his diffusion defect significant but not very mild. Of the 20% impairment, I would ascribe 10% to COPD with the diffusion defect and significant airway obstruction, consistent with his extensive and continued cigarette smoking, 5% to an element of hyperreactive airway disease superimposed on COPD and 5% to a very mild restriction consistent with mild obesity. Clearly the only element of his impairment that could be considered possibly associated with workplace exposures is the 5% impairment ascribable to the asthmatic component.

In reality, the incidence of asthma developing in adult life in cigarette smokers is substantially higher than in nonsmokers and some studies suggest 3-4 times the baseline. Therefore, his having been and being a smoker greatly increases his risk of developing hyperreactive airway disease. On the other hand, there is no history for discreet respiratory tract infection or acute event initiating the bronchospasm for the first time and his history, although inconsistent for typical industrially induced asthma, is certainly consistent with asthma that has been associated with exposure to isocyanate containing paints. Therefore, while the diagnosis of industrial asthma is not well established in this

patient and is certainly debatable, there is at least a reasonable possibility that his asthma is the product of workplace exposures. The fact that some asthmatic component continues in spite of removal from the workplace does not entirely rule out this etiologic mechanism. Suffice it to say, that while this is quite possible, the diagnosis has not been well established.

His COPD is clearly related to his cigarette smoking and not related in any way to his workplace exposures, and certainly the minimal restrictive component due to obesity is unrelated to his workplace exposures. Since he began smoking at the tender age of 17 and clearly has had chronic bronchitis and obstructive airway disease for many years, well before any established asthmatic bronchitis presented, the case does represent one of a preceding pre-existing condition, namely COPD secondary to cigarette smoking, which combined with his workplace exposures to produce a disability/impairment but is materially and substantially greater than it would have been had he had the workplace exposures alone. It is also clear that his impairment/disability cannot be solely the result of his alleged workplace exposures.

In fact, if the patient used his bronchodilator therapy as prescribed, and if he discontinued smoking entirely, as strongly advised by Dr. DeGraff, it is quite likely his bronchospasm would clear entirely and even if one acknowledged the possibly (SIC) that his asthma had been due to workplace exposures, it is likely it would be totally reversible. The patient has been advised to discontinue smoking, lose weight, and begin to do some conditioning exercises to improve his function since the absence of any physical activity of any form in the last year has greatly added to his deconditioning. It is possible his impairment could be literally reduced by 50% through physical activity, weight loss and appropriate management of his airway disease which would include immediate cessation of all smoking. I have pointed out to the patient that the natural progression of COPD is for a high incidence of asthma to be superimposed on bronchitis and emphysema as smokers age, even those smokers who have never had industrial exposures and have no occupational causation for their asthma, according to Dr. Godar. The doctor reiterated his opinions at his September 8, 1999 deposition. (RX 25)

The parties deposed Mr. Murgo on November 2, 1999 and the transcript of his testimony is in evidence as RX 26. Mr. Murgo, who has a bachelor’s degree from Salve Regina University in Newport, Rhode Island and a master’s degree in counselling from Rhode Island College in Providence and who is a certified rehabilitation counsellor (CRC), a certified disability management specialist (CDMS) and a certified case manager (CCM), testified that he met with and interviewed Claimant on August 17, 1999, that he took from him the usual social, vocational, medical and employment history, that Claimant’s shipyard work as a painter/cleaner “is considered to be skilled in medium in terms of

the level of complexity and the physical requirements," that he reviewed also Claimant's medical records and that these records "covered a variety of work-related injuries," including "injuries to both upper extremities," "bilateral carpal tunnel injuries and subsequent surgical releases," "low back injuries," "surgical procedures to both elbows" and "a pulmonary problem that was related to the work that he had been doing." Mr. Murgo did the usual vocational testing, including "the Wide Range Achievement Test, along with the Wonderlic personnel test." (RX 26 at 3-9)

Mr. Murgo further testified that Claimant "really struggled" with the tests, that his test scores were poor, that "his work capacity was not related to his cognitive ability or academic skills" and "was strictly based on his physical skills and his work ethic." Claimant also did poorly with the Purdue Pegboard test, one which "is specifically designed to evaluate fine finger and manual dexterity (of) both hands." According to Mr. Murgo, when we look at employability, we've got to consider a variety of factors," such as "age, education, cognitive ability, functional capacity and transferrable skills," and with reference to Claimant and his limited education, transferrable skills and multiple medical problems, all of these factors "effectively precluded (him) from competitive employment." Claimant is unemployable not by any single impairment but "the ability to secure work is contingent on a variety of factors, and it's the sum total of those disabilities and considerations that effectively take him out" of the work environment, especially his learning disabilities. (RX 26 at 9-15)

According to Mr. Murgo, "Someone with pulmonary limitations such as (Claimant) had ... typically would be precluded from occupations where he would be exposed to noxious substances, fuels, dusts, grinding particles," and that such limitations "would further restrict his employability, and not only in the shipyard, but elsewhere." Thus, Claimant is totally disabled by the cumulative effect of his multiple physical and cognitive problems. (RX 26 at 15-17)

Claimant leads a mostly sedentary life as any physical exertion aggravates his multiple medical problems. The Employer attempted to provide light duty work for Claimant as a messenger/escort (**i.e.**, he would personally escort shipyard visitors without security clearances) throughout the shipyard but each time he would go out into the shipyard areas the fumes from paint, chemicals and other such substances made him feel faint and nauseous, and he could only do that work for one week. The Employer required Claimant to show up for light duty work once a week and he would be sent home after one hour or so because the Employer did not have suitable work within the restrictions imposed by Dr. Browning, which restrictions, as updated over the years, can be found at $X 17 at 12-14 (4/19/85); 27-30 (2/11/93); 31-33 (3/22/94); 38-40 (2/13/95); 41-42 (7/11/95); 43-48 (2/8/96); 53 (1/28/97); 56 (3/5/98); and 58 (4/9/99). He would like to return

to work but he would have to be retrained for other work. He has filed for Social Security Administration disability benefits but he has not yet had a ruling on that claim. (TR 30-37)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that

(1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes**, **supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he/she experienced a work-related harm, and as it is

undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. §920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole." **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute

governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland**, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his asthmatic bronchitis and industrial airways disease (CX 14), resulted from working conditions or resulted from his exposure to and inhalation of asbestos at the Employer's facility. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. In this regard, **see Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989). Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing

condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusziewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955); **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Claimant's maritime employment as a painter/cleaner daily exposed him to fumes and dust from paints, welding chemicals, solvents and other injurious stimuli, that Claimant's respiratory problem, diagnosed on or about June 4, 1996 as asthmatic bronchitis and industrial asthma (RX 16), that Dr. DeGraff, as of August 14, 1996, opined that Claimant's "asthma would be adversely affected by exposure to various irritant/fumes which are present in the shipyard" (CX 13), that such respiratory condition constitutes a

work-related injury, that the Employer had timely notice of such injury, authorized appropriate medical care and treatment and paid appropriate compensation while he has been unable to work and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once Claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a painter/cleaner. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores,**

Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). Paul Murgo, M.Ed., Claimant's vocational rehabilitation expert, has opined that Claimant is totally unemployable because of his limited education, his limited transferrable skills and his multiple medical problems. (CX 16; RX 26) I therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large

number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant has been permanently and totally disabled from June 14, 1999, when he was forced to discontinue working as a result of his work-related and occupational disease.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v.**

Atlantic & Gulf Stevedores, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer, although initially controverting Claimant's entitlement to benefits (RX 2), nevertheless has accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits to the present time and continuing. (RX 3) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser**, 921 F.2d 306 (D.C. Cir. 1990); **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983); **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport**

News Shipbuilding and Dry Dock Co., 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**, 16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

Section 8(f) relief is not applicable where the permanent total disability is due **solely** to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have caused claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron)**, **supra**.

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked for the Employer since November 3, 1976 (RX 5), (2) that he has sustained numerous injuries to multiple body parts since at least 1982 (RX 7 - RX 14), (3) that the Employer accepted these injuries as compensable and paid him appropriate compensation benefits while he was unable to work, (4) that Claimant has carried work restrictions since at least April 20, 1982 (CX 1), (5) that the Employer retained Claimant as a valued employee even with actual knowledge of his multiple medical problems, (6) that Claimant's light duty work ended on June 13, 1999, and (7) that Claimant's permanent total disability is the result of the combination of his pre-existing

permanent partial disability (**i.e.**, the above-identified medical problems) and his June 4, 1996 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Godar (RX 15, RX 25), Dr. Willetts (RX 23) and Mr. Murgo. (CX 16; RX 26) **See Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Moreover, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfi0d. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**, establish a pre-existing disability for purposes of Section 8(f). **American Shipbuilding v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee." **Sacchetti**, **supra**, at 681 F.2d 37.

As noted, Claimant's smoking habit aggravates his respiratory problems and, in this scenario, smoking constitutes a pre-existing permanent partial impairment for Section 8(f) purposes.

Claimant's condition, prior to his final injury on June 4, 1996, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer. Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after March 10, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for his consideration.

The fee petition shall be filed with our Docket Clerk within thirty (30) days of receipt of this decision and Employer's counsel shall have fourteen (14) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. Commencing on June 14, 1999, and continuing thereafter for 104 weeks, the Employer as a self-insurer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $625.70, such compensation to be computed in accordance with Section 8(a) of the Act.

2. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his

June 4, 1996 injury on and after June 14, 1999.

4. Interest shall be paid by the Employer on any accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, even after the time period specified in the first Order provision above, subject to the provisions of Section 7 of the Act.

6. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on March 10, 1999.

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DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts

DWD:ln